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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA AT ANCHORAGE**

ENOCH ADAMS, JR., LEROY ADAMS,
ANDREW KOENIG, JERRY NORTON
DAVID SWAN and JOSEPH SWAN,

Plaintiffs,

v.

TECK COMINCO ALASKA INCORPORATED

Defendant.

NANA REGIONAL CORPORATION and
NORTHWEST ARCTIC BOROUGH,

Intervenors-Defendants.

Case No. A04-49 (JWS)

PLAINTIFFS' REPLY IN SUPPORT
OF OBJECTIONS TO
NORTHWEST ARCTIC
BOROUGH'S UNDISCLOSED
EXHIBITS AND MOTION *IN*
LIMINE TO EXCLUDE
EXHIBITS NOT
TIMELY DISCLOSED
(Fed. R. Civ. Proc. 26 and 37)

REPLY IN SUPPORT OF OBJECTION TO NORTHWEST
ARCTIC BOROUGH'S UNDISCLOSED EXHIBITS &
MOTION IN LIMINE TO EXCLUDE EXHIBITS

Pursuant to Federal Rules of Civil Procedure 26 and 37, Plaintiffs Enoch Adams, Jr., *et al.* (“Adams”), filed a Motion *in Limine* to exclude exhibits lodged with the Court on January 22, 2008 by Intervenor-Defendant Northwest Arctic Borough (“Borough”) which were not timely disclosed. Docket 220. Although the Borough has responded to two separate motions in limine (Docket 220 to exclude undisclosed documents, and Docket 224 to exclude an undisclosed witness) by Adams in a single document (Docket 240¹), Adams here replies only in support of its motion to exclude documents, Docket 220. Adams will reply to the Borough’s Response to Adams’s motion at Docket 224 to exclude undisclosed witness under the schedule set forth in the Court’s Scheduling Order, Docket 230.

I. INTRODUCTION

Adams brought its motion to exclude four exhibits offered by the Borough (Exhibits 2000, 2001, 2002 and 2003) because the Borough had never disclosed those documents to Adams as required under Fed.R.Civ.Proc. 26. The Borough admits it never provided Adams the documents in this case. Affidavit of Thane Tienson, Docket 240-1 (“Tienson dec.”), at ¶12. The Borough’s defense of its own admitted failure to provide the documents it seeks to admit at trial takes several tacks. First, that its disclosure of three of the documents in its motion to intervene in the *Kivalina Relocation Planning Committee v. Teck Cominco Alaska Incorporated* case (“KRPC suit”) was sufficient, and second that any failure to disclose is harmless:

the Borough was under no obligation to supplement its disclosures or responses since none was ever made in this case. Alternatively, any error on the part of the Borough in failing to earlier disclose them is either justified and/or harmless and therefore not subject to exclusion under Fed.R.Civ.P. 37(c)(1).

Borough Resp. at 13. In short, the Borough asserts that disclosure to a different plaintiff, in a different case, as part of an intervention motion that was denied by this Court, counts as Rule 26 disclosure in this case. *Id.* at 3. It claims the failure to disclose the documents was either justified, or was harmless. *Id.* at 13.

The Borough is wrong on each of these counts. It was under an obligation under Rule 26 to disclose the documents in this suit; it admits it never disclosed the documents in this suit. It never

¹The opposition was originally filed at Docket 232, subsequently struck by the Court as improperly filed, and refiled at Docket 240 on February 8, 2008.

properly disclosed the documents as documents it intended to use at trial in the KRPC suit, either. It has not justified its failure to disclose the documents in any way. And its failure to disclose the documents during the discovery period directly harms Adams as the plaintiffs were not able to do any documentary discovery or depositions on the documents, nor proffer documents or witnesses to counter or explain the documents.

II. THE BOROUGH ADMITS IT NEVER DISCLOSED THE DOCUMENTS IN THIS CASE.

The Borough concedes Adams's central point: it never disclosed the documents in this case. Tienson dec. ¶12. It cannot now be heard to protest the exclusion of its documents when it admits it has never before disclosed them to plaintiffs in this suit.

So that parties properly comply with the disclosure requirements of Rule 26, Fed.R.Civ.P. 37 provides that a party who "fails to provide information . . . as required by Rule 26(a) or (e), . . . is not allowed to use that information . . . to supply evidence on a motion, at a hearing, or at a trial, unless the failure is substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). Exclusion is "automatic and mandatory unless the sanctioned party can show that its violation of Rule 26(a) was either justified or harmless." *Salgado by Salgado v. GMC*, 150 F.3d 735, 742 (7th Cir. 1998).

The Borough's attorney is candid: "nor did NAB make any disclosures to the other parties in this case prior to January 18, 2008." Tienson dec. ¶12. This admission alone is enough to have the documents excluded under Rule 37. However, the Borough did not properly disclose the documents to the plaintiffs in the KRPC suit, either.

III. THE BOROUGH DID NOT EVEN PROPERLY DISCLOSE THE DOCUMENTS IN THE KRPC SUIT.

In the KRPC suit, all parties were under an obligation to make Rule 26 disclosures as to evidence which they were to use at trial. Although the Borough seeks to excuse its failure to disclose three of the documents in this case by pointing to its filings in the KRPC suit, that reference is misplaced, for two reasons. First, and most importantly, the Borough never properly disclosed the three documents in that case *under Rule 26*. Second, the Borough never sought to include any of its disclosures from the KRPC suit in this case in the one stipulation among all parties that governs the use of documents from that case, Docket 75. (For the record, the Borough admits the fourth

document was never disclosed in either suit.)

A. The Borough never disclosed the documents under Rule 26 in the KRPC suit.

The Borough admits that the only time it disclosed three of the documents in question was during its failed attempt to intervene. Borough Resp. at 3. Although the Borough was required by Rule 26 to disclose any documents it would rely on at trial, once it was admitted as a party, it failed to make that disclosure even in the KRPC case. Thus, there was no way for Adams to know what documents the Borough would rely on at trial. Cole Reply dec. ¶2.

The use of the documents in the Borough's failed attempt to intervene could not have put KRPC (or, more importantly, Adams) on notice that the Borough would then use those documents at trial in that case (or this one!), and thus the disclosure objectives of Rule 26 were thwarted. The Borough's reliance on its "disclosure" of the documents during a failed motion, rather than in an appropriate Rule 26 disclosure, is misplaced.

B. The stipulation among the parties did not include the Borough's claimed "disclosure."

Because of the large volume of discovery that had taken place between Teck Cominco and the Kivalina Relocation Planning Committee, when the Adams plaintiffs filed suit all parties – the plaintiffs, Teck Cominco, NANA and the Borough – stipulated as to the use of certain documents from that suit in this suit, Docket 75. Cole Reply dec. ¶3. That stipulation is specific as to which documents from the KRPC suit may be used as evidence as though discovered in this suit. Although the Borough's attorney signed the stipulation, nowhere in that stipulation is there any mention of any Borough documents. Cole Reply dec. ¶3; *see also* Docket 75 (also filed electronically at Docket 247-1). Again, there was no way Adams could know that the Borough intended to rely on documents from the KRPC suit that were not listed in the stipulation, the one filing in this case expressly governing the use of documents from the KRPC suit. Cole Reply dec. ¶4.

While the Borough asserts that "it is important to recall that this case was first commenced in September 2002," Opposition at 3:3-4, the Borough is wrong. *It won* the earlier KRPC suit. Because of that victory by the Borough, Adams was forced to file a completely new suit. The Borough cannot now claim that documents that it never properly disclosed in the KRPC suit, and never stipulated for admission in this suit, are admissible at trial here.

IV. THE BOROUGH HAS PROVIDED NO JUSTIFICATION FOR THE FAILURE TO DISCLOSE THE DOCUMENTS.

As the Borough points out (at Borough Resp. at 11), under Fed.R.Civ.P. 37(c)(1), a party is precluded from using evidence at trial if the failure to disclose was “without substantial justification.” In its Response, the Borough has provided no justification for its failure to disclose the documents. Its excuses – that it was relying on its disclosures in the KRPC case and that it had no updates to those disclosures (Tienson dec. ¶¶12-13) – are no justification at all, much less “substantial justification.” Its excuses do not outweigh the prejudice suffered by Adams here.

V. ADAMS IS PREJUDICED BY THE BOROUGH’S FAILURE TO DISCLOSE THE DOCUMENTS.

Adams moved to exclude the documents because it is harmed by the Borough’s failure to timely disclose them. Although the Borough claims its failure to comply with Rule 26 is “harmless,” Opposition at 5, Adams is most certainly prejudiced by the Borough’s failure to disclose the documents and its witness. First, the failure to disclose the documents during the discovery period precluded Adams from doing any written discovery of the Borough about the documents, such as requests for admission, requests for production, or interrogatories to discover the background, reason for adoption, relevance or status of the proffered documents. Cole Reply dec. ¶5.

Second, the failure to disclose the documents during the discovery period precluded Adams from deposing any Borough officials (or any other witness, for that matter) about their contents, history, status and relevance, or lack thereof, to this case. Cole Reply dec. ¶5. Third, the failure to disclose the documents during the discovery period precluded Adams from listing any documents it might have discovered from the Borough that would contradict, supplement, explain or undercut the documents offered by the Borough. Cole Reply dec. ¶5.

Finally, the failure to disclose the documents during the discovery period precluded Adams from securing and timely disclosing any witness(es) it might have chosen to use to amplify, contradict or otherwise comment on the Borough’s documents. Cole Reply dec. ¶5. Because the discovery period is now long over, none of these harms are curable. It would be impossible for Adams to do written discovery of the Borough, and then depositions following that, followed up by

1 further written discovery, as it has had the opportunity to do with Teck Cominco in this case. Cole
2 Reply dec. ¶6.

3 Although the Borough notes that the “disclosure” of its documents is four months before
4 trial, Opposition at 5, this misses the point: discovery in this case closed years ago. Adams is
5 directly and significantly harmed by the Borough’s failure to disclose the documents. Cole Reply
6 dec. ¶¶ 4-6.

7 **VI. THE BOROUGH’S OTHER ARGUMENTS HAVE NO MERIT.**

8 The Borough makes a series of other arguments in closing out its brief, none of which are
9 persuasive.

10 **A. The Borough has not sought judicial notice for its late-disclosed documents.**

11 The Borough next turns to FRE 201 to assert that because Courts are allowed to take
12 judicial notice of adjudicative facts, “all of the documents in question fall into the category as
13 having their late disclosure in this case be either justified or harmless.” Borough Resp. at 11. The
14 Borough has not requested judicial notice of these documents, so this argument is at this point
15 speculative, but even were the documents judicially noticeable (a point Adams does not address
16 here), Adams would oppose their admission because the Borough failed to disclose them during the
17 discovery period, without substantial justification.

18 **B. The deposition of Randolph Fischer in March 2008 offers no support for the
19 Borough’s failure to properly disclose its documents.**

20 The Borough then asserts that “there is more than ample time for plaintiffs to review and
21 consider them.” Borough Resp. at 12. Although this assertion is demonstrably false, as noted above
22 in Section V, the Borough presses on, analogizing the time to “review and consider” the late-
23 disclosed documents to the deposition of plaintiffs’ expert Randolph Fischer in Denver in March.
24 This analogy does not support the Borough. Mr. Fischer is testifying by deposition because, as an
25 elected member of the Colorado legislature, his schedule precludes him being in Alaska for trial this
26 summer. Cole Reply dec. ¶7. Because he was timely disclosed as a witness, and timely filed an
27 expert report, all parties (including the Borough) deposed Mr. Fischer in 2005. *Id.* Because he was
28 timely disclosed as a witness, Teck Cominco had the opportunity to propound extensive discovery to
Adams concerning Mr. Fischer’s testimony in 2005, and Adams provided extensive responses to that

1 discovery in 2005. Mr. Fischer also timely updated his expert report in January 2008. None of
2 these circumstances – timely disclosure of the identity of the witness, timely disclosure of his expert
3 report, deposition testimony, timely written discovery and responses, and timely updating of his
4 expert report – pertain to the documents that the Borough now offers for trial.

5 **VII. THE DOCUMENTS SHOULD BE EXCLUDED.**

6 The Borough admits it never disclosed the documents in this suit. Its purported “disclosure”
7 of three of the four documents in the KRPC suit did not meet Rule 26's requirements even in that
8 suit, and the documents were not stipulated for use in this suit. The Borough has offered no
9 justification for its failure to disclose the documents, and its failure to disclose has prejudiced the
10 Adams plaintiffs. Under Rule 37(c)(1), the documents should be excluded. Respectfully submitted
11 this 13th day of February, 2008.

12
13 /S/ Luke Cole
14 Luke Cole
15 Attorney for Plaintiffs
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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of February 2008, a true and correct copy of the foregoing Reply in Support of Objections to Northwest Arctic Borough's Exhibit List and Motion to Exclude Undisclosed Exhibits was served, via electronic mail, on the below identified parties of record:

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/s/ Luke Cole

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